Supreme Court, U. S.
FILED
NOV 1 1978
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-578

JOSEPH STEINBERGER,
Petitioner

v.

STATE OF MAINE,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT OF THE
STATE OF MAINE

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Supreme Judicial Court of Maine (App. B of Petition) affirming the conviction of the Petitioner

of criminal contempt is reported as In re Joseph Steinberger, 387 A.2d 1121 (Me. 1978).

JURISDICTION

The judgment of the Supreme Judicial Court of Maine was entered on July 10, 1978, and the court's mandate was issued on the same day. Petitioner filed on July 25, 1978 a "Motion for Alteration of Facts and Reconsideration of Mandate" which was denied by written order of the Supreme Judicial Court of Maine dated August 15, 1978.[1] Petitioner filed his Petition in this Court on October 6, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

1. Although ostensibly barred on jurisdictional grounds, see Ginn v. Penobscot Co., 342 A.2d 270 (Me. 1975), motions for "rehearing" or "reconsideration of mandate" have been entertained by Maine's Supreme Judicial Court. See, e.g., Nadeau v. State, 247 A.2d 113 (Me. 1968). However, no Maine statute or rule of court expressly authorizes a party to bring, or the court to entertain, such a motion, nor is there any limitation on the time for filing such a motion. It is unnecessary to determine the effect of the filing of the motion on the timeliness of the Petition inasmuch as the Petition was filed within ninety days of the entry of judgment. See Sup. Ct. R. 22(1).

QUESTIONS PRESENTED

1. DOES THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BAR AN ADJUDICATION OF CONTEMPT OF AN ATTORNEY WHOSE LANGUAGE, ALTHOUGH NOT CONTEMPTUOUS ON ITS FACE, RESULTED IN AN OBSTRUCTION OF JUSTICE?

2. WAS THE TOTAL RECORD CONCERNING PETITIONER'S CONDUCT AND ITS EFFECT ON THE TRIAL SO INADEQUATE AS TO PRECLUDE APPELLATE REVIEW OF THE CONTEMPT ADJUDICATION AND THEREFORE DEPRIVE PETITIONER OF HIS FOURTEENTH AMENDMENT RIGHT OF DUE PROCESS?

CONSTITUTIONAL PROVISION

Constitution of the United States, Amendment XIV, Section 1:

> "...[N]or shall any State deprive any person of life, liberty, or property, without due process of law... ."

STATEMENT OF THE CASE

On June 14, 1977 Petitioner, a member of the bar of the State of Maine, was representing the defendants in a civil jury trial. After all the evidence had been presented, the presiding justice granted the plaintiff's motion for a directed verdict on the question of the defendants' liability under the complaint. Before beginning his closing argument and after plaintiff's counsel had obtained a clarification of the justice's ruling (App. D of Petition, p. 8), Petitioner turned to the justice and in the presence of the jury said:

> "Is my understanding correct, your Honor, that the jury is not to be permitted to bring a verdict for the Defendant [sic] in this case, but may only bring a verdict for the Plaintiff?"

In his certificate filed pursuant to M.R.Crim.P. 42(a) the justice stated that Petitioner's query was uttered in "bewilderment" and "intimat[ed] to the jury that the Court was in error in so ruling." (App. A of Petition, pp. 3,4). After the justice had responded to Petitioner in the affirmative, Petitioner said to the jury, "Well, this is kind of a sad time for me because I wanted to have you be in a position --." (App. D of Petition, p. 13). At this point the justice interrupted Petitioner and expressly warned him that it would be inappropriate to act in a manner inconsistent with the court's ruling. Petitioner then proceeded with his argument, concluding it with the statement:

> "So, there you have it. You'll have to bring a verdict for the Plaintiff, but I hope that you

> will strike a blow for the jury system and for decency by coming in with a verdict for nothing. Thank you very much."

In his certificate the justice described Petitioner's manner and tone in making this statement as "insulting" and "represent[ing] a challenge to the integrity of the Court" and explained that the statement "could only be interpreted as a criticism that the presiding Justice was indecent when he granted the motions of the Plaintiff... ." (App. A of Petition, p. 3).

After a brief rebuttal argument by plaintiff's counsel, the justice asked the jury to retire to the jury room for a few minutes. He then adjudicated Petitioner guilty of contempt on the grounds set forth in the certificate. The justice ordered the jury brought back to the courtroom and, in the course of his instructions relative to the civil action, gave a curative instruction as to the remarks of

Petitioner. (App. B of Petition, p. 3). At a subsequent hearing on sentencing, the justice, after affording Petitioner an opportunity for allocution, ordered him to pay a fine of $500.00.

On direct appeal to the Maine Supreme Judicial Court, Petitioner challenged the contempt finding on two grounds: first, that the certificate failed to set forth sufficient facts to permit appellate review, and second, that his conduct did not constitute criminal contempt. In denying Petitioner's appeal, the Maine court found the presiding justice's certificate to be adequate and determined that the justice had "good reason to believe that by the totality of his conduct... [Petitioner] was asking the jury to manifest disapproval of the Justice's [ruling]." The court concluded that Petitioner "thus impeded the presiding Justice in the exercise of

his judicial function, and prerogative, to have the jury accept without reservation the law as he had given it" and that this "was an obstruction of the orderly administration of justice constituting contumacious conduct." (App. B of Petition, p. 8).

ARGUMENT

I. WITH THE POSSIBLE EXCEPTION OF PETITIONER'S CLAIM AS TO THE SUFFICIENCY OF THE JUSTICE'S CERTIFICATE, A FEDERAL QUESTION WAS NEVER RAISED IN THE STATE COURT.

In his direct appeal to the Supreme Judicial Court of Maine, Petitioner raised but two issues: (1) whether the facts set forth by the presiding justice in his certificate were recited with sufficient particularity, as required by M.R.Crim.P. 42(a), to enable an appellate court to make an informed review; and (2) whether his conduct in fact constituted contempt.

Petitioner neither cited a particular constitutional provision nor made a general

reference to "the constitution" in support of his state court argument attacking the specificity of the recitation of facts in the justice's certificate. Nevertheless, because the requirement of specification in M.R.Crim.P. 42(a) is based upon the constitutional requirement of due process, Alexander v. Sharpe, 245 A.2d 279, 288 (Me. 1968), it would appear that Petitioner's appellate contention might be judicially construed as an assertion that the lack of particularization in the certificate denied him due process. Although the Maine court has not expressly indicated whether its holding in Alexander v. Sharpe, supra, is based upon the state or federal constitution, its continued construction of the due process clauses of the two constitutions as identical and coextensive in similar circumstances, see, e.g., Green v. State, 247 A.2d 117, 119 (Me. 1968), indicates that at least tacitly the Maine court in

Alexander held the certification requirement of M.R.Crim.P. 42(a) to be mandated by the Due Process Clause of the Fourteenth Amendment. Therefore, it would appear that a decision of a Maine court determining the adequacy of a contempt certificate would be based, at least partially, on federal constitutional grounds. However, even if this Court has jurisdiction to examine the issue, the exercise of that jurisdiction is not warranted for the reasons set forth in Arguments II, III and IV of this Brief.

In advancing his second argument before the Maine Supreme Judicial Court, Petitioner claimed no federal (or state) constitutional deprivation, but argued only that his conduct did not satisfy the elements of criminal contempt as that offense is defined by the common law of Maine.[2] Although it is true,

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2. Contempt has been defined in Maine as "'any act which is calculated to embarass, hinder, or obstruct the court in the administration of justice or to lessen its authority or dignity',... '[c]onduct as tends to bring

as Petitioner asserts (Petition, p. 5), that he cited In re McConnell, 370 U.S. 230 (1962), in his brief submitted to Maine's highest court, he cited that decision to support his proposition that the summary contempt power must be exercised with caution and for the benefit of that opinion's dicta regarding the great latitude which must be afforded attorneys in the area of vigorous advocacy. Before Maine's highest court Petitioner did nothing more than recite Maine's definition of criminal contempt, apply that definition to the facts of his case, and (urging that the court exercise the same caution the United States Supreme Court had urged upon the federal courts in In re McConnell, supra) argue that his

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the authority of the court and the administration of the law into disrespect or to defeat, impair, or prejudice the rights of witnesses or parties to pending litigation'... [or] '[t]o obstruct the administration of justice.'..." In re Holbrook, 133 Me. 276, 280, 177 A. 418, 420 (1935) (citations omitted); accord, Stern v. Chandler, 153 Me. 62, 66, 134 A.2d 550, 553 (1957).

conduct was not a contempt under Maine law. Petitioner never cited any constitutional provision, federal or state, or made reference to any constitutional deprivation. Because Petitioner never presented a federal question to the Maine Supreme Judicial Court relative to the sufficiency of the evidence to support a contempt finding, either in his direct appeal or in his subsequently filed "Motion for Alteration of Facts and Reconsideration of Mandate," this Court is without jurisdiction to entertain the first of the two questions presented by Petitioner (Petition, p. 2). 28 U.S.C. §1257(3); see, e.g., Cardinale v. Louisiana, 394 U.S. 437 (1969).

Furthermore, to the extent that Petitioner may be claiming that a specific intent to obstruct justice is an essential ingredient of a state contempt conviction pursuant to the Due Process Clause of the Fourteenth Amendment (Petition, p. 7), and that he was denied due process in the Maine courts be-

cause such specific intent was not established, this Court is without jurisdiction to entertain the issue because it was never raised before the Maine Supreme Judicial Court. Id. Additionally, Respondent submits that if on the basis of the language appearing on pages 10-11 of the Petition, Petitioner is seeking to have this Court decide whether Maine's definition of contempt is "too broad and vague" to satisfy federal due process requirements, this Court would be without jurisdiction to entertain the issue since it was never raised in the state court proceedings. Id.

II. THE DECISION OF THE STATE COURT IS CORRECT.

The Maine court's ruling as to the sufficiency of the certificate filed pursuant to M.R.Crim.P. 42(a) was manifestly correct. The certificate identified the particular conduct of Petitioner which formed the basis of the contempt. It quoted precisely the

language used by Petitioner and described the tone and manner in which the language was expressed. The certificate both identified the conduct constituting the contempt and explained its contumacious tendency. Cf., e.g., In re Williams, 509 F.2d 949, 959 (2d Cir. 1975); United States v. Schrimsher, 493 F.2d 842, 845 (5th Cir. 1974). The specificity of the facts recited in the certificate, conjoined with the evidence in the trial transcript of the consequent interruptions in the trial and the justice's curative instruction, provided a legally adequate basis for appellate review.

Petitioner attacks the decision of the Maine Supreme Judicial Court as to whether his conduct constituted contempt by isolating one statement made by him - his request that the jury "strike a blow for the jury system and for decency by coming in with a verdict for nothing" - and contending that because this statement did not result in an actual

obstruction of justice, the contempt adjudication denied him due process. The Maine court, however, properly assessed the totality of Petitioner's conduct as set forth in the contempt certificate, and its consequent effect on the trial, in deciding that his conduct resulted in an obstruction of the orderly administration of justice. The evidence amply supported the court's conclusion. Petitioner's initial reaction of "bewilderment" to the presiding justice's ruling, together with the remark made immediately thereafter to the jury that the ruling made it a "sad time" for Petitioner, resulted in an interruption in the trial brought about by the need to admonish Petitioner to act in accordance with the ruling. Petitioner was then expressly warned by the justice to discontinue his insinuative attack upon the court's ruling. His request that the jury "strike a blow for the jury system and for decency" then resulted in an additional interruption as the jury

was excused from the courtroom and Petitioner adjudicated guilty of contempt. Finally, the justice was compelled to give the jury a curative instructive in an attempt to amelioriate the prejudicial impact of Petitioner's conduct. In view of the actual disruptions in the trial and the potential prejudice to the plaintiff in the civil action caused by Petitioner's conduct, and in light of the express admonition given Petitioner, the Maine Supreme Judicial Court correctly concluded that the record before it supported the contempt finding.

III. THE DECISION OF THE STATE COURT DOES NOT CONFLICT WITH THE HOLDINGS OF THIS COURT.

Petitioner apparently attempts to establish a conflict between the decisions of this Court and the state court decision below by asserting that the decisions of this Court have construed the Due Process Clause of the Fourteenth Amendment to

require the States to include as elements of criminal contempt both "an actual obstruction of justice" (Petition, pp. 6-7) and a specific "intent to obstruct justice" (Petition, p. 7), and by then concluding that the Maine Supreme Judicial Court failed to apply these two elements in assessing the contumacious character of Petitioner's conduct.

Assuming, arguendo, that the Fourteenth Amendment demands that states require an obstruction of justice before adjudicating a person guilty of contempt,[3] the decision

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3. In Holt v. Virginia, 381 U.S. 131 (1965), cited by Petitioner, this Court expressly declined to pass on the question whether the summary convictions of the attorney-contemnors were invalid because their alleged misconduct did not disturb the court's business or threaten demoralization of its authority. Id. at 135-36 n.2. Respondent submits that the requirement of an obstruction of justice, albeit imposed upon the federal courts by 18 U.S.C. §401, is not a constitutionally compelled predicate for a contempt adjudication by a state court. See In re Buckley, 10 Cal.3d 237, 251-55, 514 P.2d 1201, 1210-13, 110 Cal.Rptr. 121, 130-33 (1973), cert. denied, 418 U.S. 910 (1974).

of the court below is wholly consonant with that requirement. The Maine court expressly applied to Petitioner's conduct the standard enunciated by this Court in In re McConnell, 370 U.S. 230, 236 (1962) ("an obstruction which blocks the judge in the performance of his judicial duty"). (App. B of Petition, p. 7). The court concluded that his conduct "was an obstruction of the orderly administration of justice constituting contumacious conduct." (App. B of Petition, p. 8).

With respect to Petitioner's assertion that a specific intent to obstruct justice is mandated by the Fourteenth Amendment as an element of state definitions of contempt, Respondent submits that this Court has never imposed upon the states such a rule. The two cases cited by Petitioner in support of this proposition, Panico v. United States, 375 U.S. 29 (1963), and In re Watts, 190 U.S. 1 (1903), lend no support to his assertion. Because the mens rea element Petitioner advances has never been consti-

tutionally required of the states by this Court, the decision of the Maine court does not conflict with decisions of this Court. Moreover, Respondent reiterates that an issue concerning a constitutionally mandated element as to mens rea was never raised in the Maine court.

IV. A SUBSTANTIAL FEDERAL QUESTION IS NOT PRESENTED.

The Maine Supreme Judicial Court held that the justice's certificate was sufficient to permit appellate review and that Petitioner's conduct constituted a contempt under Maine law. In view of the Maine court's manifest recognition of the due process basis of the requirement that the certificate recite the pertinent facts with particularity (App. B of Petition, p. 4), the court's decision as to the adequacy of the certificate was a purely factual one limited to the circumstances of Petitioner's case. Similarly, the issue as to whether Defendant's conduct constituted a contempt required a

determination which was purely one of fact. Neither holding of the court involved the determination of a significant constitutional issue likely to have a substantial impact upon Maine attorneys or Maine litigants. The Maine court did not promulgate new rules of constitutional law, nor did it reject or alter established constitutional rules relating to contempt. Indeed, as pointed out in Argument I, supra, Petitioner never asked Maine's highest court to apply federal constitutional principles to the contempt adjudication. The holding of the Maine court was confined to the peculiar facts before it. Consequently, the exercise of this Court's discretionary jurisdiction is not warranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the Rules of the Supreme Court of the United States, the undersigned, counsel of record for the Respondent, on the date written below, did deposit three copies of the above "Brief for Respondent in Opposition" in the United States Mail in Augusta, Maine, first class postage prepaid, addressed to Petitioner as follows:

Joseph Steinberger
Waldoboro, Maine 04572

Dated at Augusta, Maine, this 31st day of October, 1978.

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